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Supreme Court of the United States

October Term, 1935

No. 48

PACIFIC STATES BOX AND BASKET COMPANY, a California corporation,
Appellant,

vs.

S. T. WHITE, successor to Max Gehlhar, as Director of Agriculture for the State of Oregon, and FRANK McKENNON, successor to Chas. A. Cole, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon,
Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Oregon.

ARTHUR A. GOLDSMITH,
Portland, Oregon,

BYRON C. HANNA,
Los Angeles, California,
Solicitors for Appellant.

I. H. VAN WINKLE,
Attorney General of the State of Oregon,

WILLIS S. MOORE,
Assistant Attorney General of the State of Oregon,
Solicitors for Appellees.

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PACIFIC STATES BOX AND BASKET COMPANY, a California corporation,
Appellant,

vs.

S. T. WHITE, successor to Max Gehlhar, as Director of Agriculture for the State of Oregon, and FRANK McKENNON, successor to Chas. A. Cole, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon,
Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Oregon.

REPORT OF CASE BELOW

The official report of the opinion delivered in the above entitled case in the United States District Court for the District of Oregon, is reported in 9 Fed. Supp. 341 under the title of Pacific States Box and Basket Company, a California corporation, Plaintiff, v. Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants. The opinion appears in the printed record on page 28.

JURISDICTION OF COURT

The appellant has complied fully with Paragraph 1 of Rule 12. See printed Statement as to Jurisdiction and Reply to Statement Opposing Jurisdiction, on file.

STATEMENT OF CASE

Appellant, Pacific States Box and Basket Company, is a California corporation engaged in that state in the business of manufacturing and selling fruit and vegetable baskets and other containers, as well as berry cups. The original defendants were Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon. Since this appeal was taken, Max Gehlhar has resigned as Director of Agriculture and Chas. A. Cole has resigned as Chief of the Division of Plant Industry, and S. T. White is now the duly qualified and acting Director of Agriculture for the State of Oregon, succeeding Max Gehlhar on or about April 1, 1935, and Frank McKennon is now the duly qualified and acting Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, succeeding Chas. A. Cole on or about May 1, 1935. There is on file with the Clerk of this Court Appellant's motion to proceed with the appeal against the successors in office of the original defendants and appellees, together with a stipulation providing for the substitution of appellees and for continuance of appeal, the motion showing that there is substantial need for continuing and maintaining this appeal and obtaining an adjudication of

the questions involved therein. For the purpose of simplicity, we will consider as the appellees and as the defendants in the court below the particular officials, that is, the Director of Agriculture and the Chief of the Division of Plant Industry, without reference to the change in personnel of these offices.

This is a direct appeal from the United States District Court for the District of Oregon, sitting as a statutory court of three judges, denying plaintiff's application for an interlocutory injunction and granting defendants' motion for a dismissal of the complaint, and from a final decree denying plaintiff's prayer for a permanent injunction and dimissing the above entitled suit.

The amended bill of complaint and the affidavits of Herman Paine are not controverted. No affidavits have been filed by the defendants. The facts below outlined are alleged in the amended bill of complaint or are contained in the affidavits of Herman Paine.

This is a suit to enjoin the appellees from enforcing certain orders of the Department of Agriculture of the State of Oregon fixing standard containers for strawberries and raspberries. (The pertinent parts of these orders are set forth below.) These orders were made pursuant to *Section 18-2902 and Section 18-2911, Oregon Laws of 1930, and Sections 3 and 8 of Chapter 225, Oregon Laws of 1933*, and appellant seeks to enjoin the enforcement of these statutes insofar as they relate to strawberry and raspberry containers. The above statutes are set forth in

an appendix to this brief. The amended bill of complaint alleges that appellant is a California corporation and has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents and to insure uniformity of cubic measure. The baskets so constructed have openings to insure ventilation, thus tending to prevent decay, and allowing a prospective customer to see the contents, and the cubic content is one pint. The baskets made by appellant do not have a false, raised, or set-up bottom. These baskets are known as tin-top berry baskets or cups. Appellant has sold such baskets in large quantities to dealers in Oregon for more than nine years and they are in general use in the United States. The packing of strawberries or raspberries in tin top baskets as herein described is conducive to the preservation of the berries contained therein, to honest measurements, and to fair dealing with purchasers. (R. 4 and 5.)

At this point, we will set forth those parts of the orders made by the appellees against which appellant is invoking the aid of this Court:

"RASPBERRIES

Crate—24-pint hallocks,.....Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

STRAWBERRIES

Crate—24-pint hallocks,.....Size of hallocks, $2\frac{1}{2}$x$4\frac{3}{8}$ inches outside measurements, bottom set up $\frac{3}{4}$ inch, inside depth $1\frac{3}{4}$ inches.

"As provided by sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material.

"Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

CHAS. A. COLE, Division Chief.

Approved,

MAX GEHLHAR,
Director of Agriculture."

The above quotation was taken from a pamphlet entitled "Standard Containers for Fruits and Vegetables", Exhibit A of Plaintff's Amended Bill of Compaint. (R. 12 and 13.) The same material so far as it relates to the specifications of containers for strawberries is found in Plaintiff's Exhibit B attached to its Amended Bill of Complaint. (R. 13, 14 and 15.)

Wherever these orders are referred to hereinafter in this brief only those parts of the orders dealing with the

specifications for strawberry and raspberry containers is under consideration.

A hallock is one type of berry cup manufactured of rotary-cut veneer taken directly from spruce logs. (See top of page 3 of affidavit of Herman Paine dated June 15, 1934.) (R. 26.)

It is alleged in Paragraph V of the Amended Complaint (R. 4) that the appellees have taken steps to enforce the objectionable orders and have warned Oregon dealers not to use the tin-top cup or basket, and have advised appellant that such type of cups or baskets are not legal in Oregon.

In Paragraph VII there is the following language:

> "That the right to continue to sell such tin top berry baskets or cups to dealers in the State of Oregon is of great value to Plaintiff, far exceeding in amount the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon." (R. 5)

In the same paragraph of the complaint, it is alleged that the orders complained against were made and promulgated arbitrarily, capiciously and unlawfully in that they limit the type of strawberry and raspberry containers to the so-called hallock, and that they specify certain definite dimensions, and provide that the baskets must have a bottom set up ¾ of an inch. It is alleged that the effect of the said orders is to prevent the sale by appellant and other manufacturers of the tin top type of containers

or cups with solid bottoms in this state. There is the further allegation that the machinery of appellant cannot manufacture the type of basket or hallock described in the above mentioned orders without expensive change. The affidavit of Mr. Herman Paine dated June 15, 1934, (R. 26), states that the value to appellant of its established business in the sale of tin-top baskets or cups to dealers in the State of Oregon for use as strawberry or raspberry containers is at least $50,000.00; that the net receipts from sales of such baskets for 1932 and 1933 to dealers in Oregon was $6699.62 after deducting allowances for freight to Oregon dealers and that it would cost Appellant at least $25,000.00 to install the necessary machinery to manufacture hallock baskets in quantities equivalent to its average sales of tin-top baskets in the State of Oregon during the past two years. The amended bill of complaint further alleges that the basket provided by the orders under attack can be made only of spruce which is grown only in the Pacific Northwest. (R. 6.) It is further alleged that the so-called hallock is not the type of berry basket in general use throughout the United States, nor are the particular dimensions stated in the orders generally recognized as standard. Paragraph VIII of the amended complaint contains the following language:

> "That there is no necessity for the particular orders relating to strawberries or raspberries as set forth in Exhibit A and Exhibit B based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does

not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon." (R. 6)

Paragraph IX of the amended complaint sets forth that the necessary effect of the orders in question is to grant a monopoly to manufacturers of the so-called hallocks. (R. 26.)

As these allegations are not denied, they must be taken as admitted.

Appellant claims that the orders in question insofar as they relate to containers for strawberries and raspberries, are unlawful and void, because:

1. They deprive Appellant of its property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States, in that the tin-top baskets made by Appellant (as well as others), cannot be used for packing strawberries or raspberries for sale in the State of Oregon without making the users liable to arrest and subject to fine and imprisonment. The necessary effect of said orders is to prevent Appellant from making sales to those who desire and formerly used this type of basket or cup. The orders arbitrarily interfere with the legitimate business of Appellant. The orders grant a monopoly to manufacturers of hallocks and prevent the Appellant and all others who manufacture and sell different types of berry cups from selling their product to producers and dealers who desire to ship berries into Oregon, as well as to Oregon dealers and producers who desire to use tin-top berry cups or other recognized types of berry cups. The orders are unreasonably discriminatory

in favor of the hallock and against all other types of berry cups, including the tin-top cups made by Appellant.

2. The orders are void for the reason that they interfere with and impose unlawful burdens on the interstate commerce and business of Appellant, contrary to and in violation of *subdivision 3 of Section 8 of Article 1 of the Constitution of the United States.* Appellant is prevented by said orders from obtaining business from dealers in Oregon for baskets manufactured by it in California, and its sales to dealers and producers in California packing California berries for sale in Oregon, are interfered with because it is illegal to sell any berries in the State of Oregon irrespective of where they originate, if packed in other than standard containers. Said orders were arbitrarily made by appellees and have the effect of legislation which arbitrarily and unjustly discriminates against products made in another state in favor of a product which can be made only in the Northwest.

3. *Section 18-2902, Oregon Code of 1930,* the statute under which the orders were made, is an unconstitutional delegation of authority to administrative officials.

SPECIFICATIONS OF ERRORS

The Appellant intends to urge the following assigned errors (R. 36 et seq.):

I.

The Court erred in refusing to enjoin the defendants and their successors in office in their official capacities as

heads of the Department of Agriculture for the State of Oregon, from enforcing orders of said Department fixing standard containers for strawberries and raspberries, which orders provided that the standard containers for such berries shall be: "Raspberries: Crate—24-pint hallocks, 5 1/8 inches deep, 16 5/8 inches wide, and 23 1/4 inches long, all inside measurements. Center partition 3/4 inches, ends and partition grooved for double deck. Size of hallock, 2x5 1/4x5 1/4 inches, outside measurements. Bottom set up 3/4 inch, inside depth 1 1/4 inches." "Strawberries: Crate—24-pint hallocks, 6 3/8 inches deep, 13 3/4 inches wide, and 19 1/4 inches long, all inside measurements. Half inch center piece. Size of hallocks, 2 1/2x4 3/8x4 3/8 inches outside measurements, bottom set up 3/4 inch, inside depth 1 3/4 inches." The first of these orders was dated May 3, 1933, and entitled "Standard Containers for Fruits and Vegetables" and the other order was dated June 1, 1933, and entitled "Oregon Standards for Strawberries (1933)", the material parts of said orders so far as they relate to raspberries and strawberries being the same. Said orders are attached to and made a part of Plaintiff's amended bill of complaint as Exhibit A and B thereof.

II.

The Court erred in failing to enjoin the enforcement of *Section 18-2902 and Section 18-2911, Oregon Code of 1930* (the official publication and compilation of the general laws of Oregon) and *Section 3 and Section 8 of Chapter 225, Oregon Laws of 1933* (which was officially published by the State of Oregon under such title) insofar as

they purport to sustain the orders mentioned in Assignment of Errors No. I and make the violation thereof unlawful and punishable. These statutory provisions are set forth in full in Paragraph IV of plaintiff's amended bill of complaint.

III.

The Court erred in failing to hold that the orders in question are arbitrary, capricious and unlawful as they relate to strawberry and raspberry containers.

IV.

The Court erred in refusing to hold that the said orders above referred to and the statutory provisions under which they were issued, insofar as they relate to strawberry and raspberry containers, were void as being in conflict with *Section 1 of the 14th Amendment of the Constitution of the United States*, and in failing to hold that said orders deprive Plaintiff of its property without due process of law.

V.

The Court erred in refusing to hold that said orders and the statutory provisions above referred to were void and were in conflict with *sub-section 3 of Section 8 of Article 1 of the Constitution of the United States* in that they interfere with and impose unlawful burdens on the interstate commerce and business of the Plaintiff.

VI.

The Court erred in refusing to hold that the orders above mentioned and the statutory provisions above set forth, insofar as they purport to sustain such orders, relating to raspberry and strawberry containers, are violative of the constitutional rights of Plaintiff.

VII.

The Court erred in denying Plaintiff's application for an interlocutory injunction enjoining the enforcement of the orders and statutory provisions cited in Assignment of Errors No. I and II hereof, in that the amended bill of complaint and the supporting affidavits were not denied, and said amended bill of complaint and affidavits set forth facts showing the said orders and statutory provisions, in question to be unconstitutional.

VIII.

The Court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint in that said amended bill of complaint did state sufficient facts to warrant the issuance of an injunction against the orders and statutes, which were clearly shown to be unconstitutional.

X.

The Court erred in entering a final decree dismissing plaintiff's suit and denying its application for a permanent injunction in that such action was taken without the in-

troduction of any testimony, and where the record consisted of plaintiff's amended bill of complaint and uncontradicted affidavits in support of its application for an injunction, which amended bill of complaint alleged sufficient facts to warrant the conclusion that the orders were clearly arbitrary, unreasonable and capricious, and therefore unconstitutional and void.

ARGUMENT

SUMMARY OF ARGUMENT

I. The Orders are Void Because they Deprive Appellant of its property without Due Process of Law.

(a) A going business is a valuable property right and entitled to Constitutional Protection.

(b) There is a difference between Legislative determination and an order of an Administrative Official.

(c) Legitimate bounds of Police Power.—Review of illustrative cases.

(d) Factual analysis of Orders.

1. The type of cup specified in the orders does not prevent fraud.
2. The specified cups do not preserve the public health.
3. They do not promote public welfare.
4. The orders do provide for a monopoly.

(e) The presumption of constitutionality of acts of legislature is rebuttable.

(f) The orders are arbitrary, capricious and unreasonable.

(g) Official containers are invalid because they differ from standards approved by Congress.

(h) There is only a rebuttable presumption of Constitutionality for Acts of Legislature.

II. The Orders in question are void because they interfere with and impose unlawful burdens on the Interstate Commerce of Appellant.

III. The statute, under the authority of which the challenged orders were made, constitutes an unlawful delegation of authority to administrative officials.

IV. Conclusion.

I. THE ORDERS ARE VOID BECAUSE THEY DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

(a) A Going Business is a Valuable Property Right.

The necessary effect of the orders in question is to deprive appellant of its valuable business in the State of Oregon, because dealers who were formerly purchasing such baskets from the appellant have been warned by officials of the State Department of Agriculture that they would not be allowed to sell strawberries or raspberries in any container other than the standard containers described in the orders. The natural result was that they were afraid to purchase baskets made by appellant which were of a different type than specified as the standard. The effect of the orders is thus to deprive appellant of its

business. (R. 6, 7.) That a going business is a valuable property right which is entitled to constitutional protection is clear.

> "That appellant's business is a property right (Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465, 65 L. ed. 349, 356, 16 A.L.R. 196, 41 Sup. Ct. Rep. 172; Truax v. Corrigan, 257 U. S. 312, 327, 66 L. ed. 254, 260, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear."
>
> Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 111, 73 L. ed. 204, 208, 49 S. Ct. 57.

> "Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."
>
> Pierce v. Society of Sisters, 268 U. S. 510, 536; 69 L. ed. 1070, 1078, 45 S. Ct. 571.

(b) Difference Between Legislative Determination and Order of Administrative Official.

This case raises the issue of how far an *administrative official* can go in fixing specifications for official containers and outlawing all containers which do not comply with such specifications.

The orders under attack were not made by the Legislature, but by an administrative official and there is no showing of any supporting evidence. Furthermore, the

statutes under which the purported authority is derived, make no provision for appeal.

> "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the Legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."
>
> Southern Railway Co. v. Virginia ex. rel. Shirley, 290 U. S. 190 at 197, 78 L. ed. 260 at 266, 54 S. Ct. 148.

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of facts, those determinations must be shown."
>
> Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. Ad. Op. 223, 238, 55 S. Ct. 241.

In the Court below, counsel for appellees argued that the orders were adopted after full hearing and consideration of the subject by parties interested. There is nothing in the record except the amended bill of complaint and exhibits attached, and the affidavits of Herman Paine. While it is true that one of the orders states that a public hearing was held in Portland under date of April 15, 1933, all that is noted is that the hearing was to consider standard containers and that certain standard containers were considered and recommended. (R. 10.) There is no finding of fact as to why the particular containers were recommended, why the detailed specifications were adopted, and why the hallock was adopted and all other

types of berry boxes were outlawed. There is nothing to show who was present at the hearing, what notice was given or even whether the majority present recommended other containers. There is nothing to show why the particular specifications further or promote horticultural interests of the State of Oregon.

There must be an ascertainment of facts after hearing and investigation before an administrative officer can act.

> Wichita Railroad Co. v. Public Utilities Commission, 260 U. S. 48; 67 L. ed. 124 at 130.
>
> Mahler v. Eby, 264 U. S. 32 at 44, 68 L. ed. 549 at 556.
>
> Panama Refining Co. v. Ryan, supra.

While there is a rebuttable presumption of fact as to the constitutionality of an act of the legislature (Borden's Farm Products Co. vs. Baldwin, 79 L. ed. Ad. Op. 130), there is no such presumption of constitutionality or validity of an order of an administrative official.

> Southern Railway Co. v. Virginia, supra.

It is submitted that in challenging orders of the appellees, appellant is not required to make as strong a showing as if the orders establishing the specific standards were the act or acts of the Legislature. But even though the orders in question were made by the legislature, the determination of what constitutes proper exercise of the police power is not final or conclusive but is subject to supervision of the courts.

(c) Legitimate Bounds of Police Power.

This Court has given frequent expression to the legitimate bounds of the police power. The following are illustrative statements of the general principles involved:

Mugler v. Kansas, 123 U. S. 623 at 661, 31 L. ed. 205 at 210, 8 S. Ct. 273: "The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385 at 388, 14 S. Ct. 499: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Welch v. Swasey, 214 U. S. 91, 105, 53 L. ed. 923 at 929, 29 S. Ct. 567: "The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish or aid in the accomplishment of, some purpose for which the

legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are arbitrary and unreasonable, and beyond the necessities of the case, the courts will declare their invalidity."

Burns Baking Co. v. Charles Bryan, 264 U. S. 504, 68 L. ed. 813 at 826, 44 S. Ct. 412: "But a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Meyer v. Nebraska, 262 U. S. 390, 399, 67 L. ed. 1042, 1045, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted."

Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. ed. 1042 at 1045, 43 S. Ct. 625: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499."

New State Ice Co. v. Liebmann, 285 U. S. 262 at 278, 76 L. ed. 747 at 754, 52 S. Ct. 371 at 375: "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld in consistence with the Fourteenth Amendment. Under that Amendment, nothing is more clearly settled than that it is beyond the power of a state 'under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them'."

Nashville, Chatanooga & St. Louis Railway Co. v. Walters, 79 L. ed. Ad. Op. 458 at 461: "The police power is subject to the constitutional limitation that it may not be exercised arbitrarily or unreasonably."

Washington ex. rel. Seattle Title & Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210 at 213, 49 S. Ct. 50: "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activity."

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 79 L. ed. Ad. Op. 614 at 617: "A claim that action is taken under the police power of the state cannot justify disregard of constitutional inhibition. • • • "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." (Page 619.)

The above cases decided by this Court are cited primarily as laying down the general principles and not because they deal with facts substantially similar to the facts in the case at bar. The case of *Mattei v. Hecke,* 99 Cal. App. 747, 279 Pac. 470, deals with the fruit standardization act of the State of California and is closely in point on the facts. It involved the constitutionality of a portion of the California Fruit, Nut and Vegetable Standardization Act of 1927, which provided among other things that unless grapes were packed in certain standard containers, the container should be marked "irregular container". The plaintiff was a large grape grower and shipper who had been warned by the Department of Agriculture that the use of certain lug boxes of dimensions different than those authorized under the California Act must be marked "irregular container", and that legal proceedings would be instituted against him if he persisted in using other than standard boxes. He then filed a complaint for an injunction seeking to restrain the Director of Agriculture of the State of California and the Horticultural Commissioner of Fresno County from prosecuting him or preventing him from packing his grapes in the containers that he was actually using. The Court below granted a temporary injunction, from which order the appeal was taken. After a full discussion of the relative rights of the citizens of the State and the exercise of the police power, the Court held the Act unconstitutional.

Another recent case which deals with the question of packing of fruit is *Inman v. Sandvig,* 170 Wash. 112, 15 Pac. (2nd) 696. In that case the plaintiff, having an

established apple growing business in Yakima County in the State of Washington, commenced an action seeking injunctive relief against the Prosecuting Attorney and other officials charged with the enforcement of a certain horticultural statutory provision and the rules and regulations adopted and promulgated in pursuance thereof. The case was tried upon the merits.

> "We are of the opinion that the rule adopted and promulgated by the director of agriculture on August 1, 1932, with reference to third grade apples, in so far as that rule provides that third grade apples 'shall not be wrapped nor packed nor lidded in a standard apple box of the state of Washington,' is unreasonably discriminatory as against third grade apples in favor of first and second grade apples, and in violation of section 3, article 1, of our state Constitution, providing that 'no person shall be deprived of life, liberty, or property without due process of law', and section 12, article 1 of our state Constitution, providing that 'no law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations'. The word 'law', as used in this section, manifestly includes a rule made by any administrative authority, as well as a law made by direct legislative authority. Our conclusion seems to us so plainly correct as to render it unnecessary to call for any extended review or citation of the many court decisions and texts supporting it. The controlling principles are well stated in general terms in the text of 6 R.C. L. 196 as follows: 'The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without

which property cannot be conceived. Hence a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes, or destroys its value, or restricts or interrupts its common, necessary or profitable use, or hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it, and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally.'

"Our conclusion therefore is that appellants are entitled to injunctive relief restraining the respondents from enforcing the rule adopted and promulgated by the director of agriculture on August 1, 1932, in so far as that rule provides that third grade apples "shall not be wrapped nor packed nor lidded in a standard apple box of the state of Washington." (Page 698.)

The Oregon Supreme Court on October 1, 1935, rendered its decision declaring unconstitutional the State Agricultural Adjustment Act, in the case of *I. H. Van Winkle, et. al. vs. Fred Meyer, Inc., et. al.* (Not yet in printed form. Copies of the decision will be supplied as soon as published.) The suit was instituted by the plaintiffs to restrain defendants from violating a certain state ice cream marketing agreement adopted pursuant to the State Agricultural Adjustment Act of 1933 as amended in 1935. The Act is very similar to the Federal Agricultural Adjustment Act and provides

that widespread agricultural distress exists causing disorganization of trade and industry and effecting the public welfare and that in order to promote the rehabilitation of agriculture, it is the policy of the state to cooperate with the national government in the declared purposes and policy of the National Agricultural Adjustment Act and to that end to permit and encourage a formulation of and provide for the enforcement of marketing agreements among producers, manufacturers, distributors and others, handling or processing within the State of Oregon any agricultural product produced or marketed within the state. After an extended discussion of whether the Act was an unconstitutional delegation of authority, and the Court so held (we will comment on this point at a later point in this brief), the Court discussed the matter as to whether the Legislature had authority to enact the legislation under the police power. The following are quotations from the opinion of the Court:

> "The next question presented is: Does the legislature of this state have the authority to enact a law fixing the price of agricultural products or regulating and restricting the production and sale thereof, or authorize that to be done by some subordinate state agency? It should be noted in this connection that this act is not a sanitary measure, nor was it designed to prevent the manufacture or sale of any impure food product. Its sole purpose was to raise the price of agricultural products in this state and obviously to restrict the amount which could be produced or sold, and this, we think, was entirely beyond the legislative power. *No one, we think, would seriously contend that farming is a business affected with a public interest, nor can it be contended that the business of processing and selling farm products is affected with*

a public interest. (Italics ours.) The merchant can hardly be said to have devoted his store and its contents to a public use when he sells or offers to sell some agricultural product or some derivative thereof. The same is true of persons engaged in processing and preparing such products for human consumption. The legislature, under the police power, may pass any reasonable sanitary law to protect the public from the sale of impure or deleterious food products, but this act was not designed for that purpose, nor does it have that effect, and hence it does not come within the police power of the state since the business and industry covered by this act are not affected with a public interest and none of the property used in such business or industry has ever been devoted to a public use. The law upon this question is clearly stated in Williams v. Standard Oil Co., 278 U. S. 235, 239, as follows:

> 'It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." Wolff Co. v. Industrial Court, 262 U. S. 522; Tyson & Brother v. Banton, supra; Fairmont Co. v. Minnesota, 274 U. S. 1; Ribnik v. McBride, 277 U. S. 350. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the con-

> clusion that it has been devoted to a public use and its use thereby in effect granted to the public. Tyson & Brother v. Banton, supra, p. 434. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id., p. 430. The meaning and application of the phrase are examined at length in the Tyson case and we see no reason for restating what is there said'."

We believe that the opinion of the highest court of the state whose statutes are the subject of this suit should prove strongly persuasive. The Oregon Supreme Court holds that farming is not a business affected with a public interest. Therefore, the statute which we are attacking, *Section 18-2902, Oregon Code, 1930*, cannot be sustained on the theory that the horticultural interests of the state are affected with a public interest. Appellees therefore cannot rely on the police power, except in the field generally recognized, such as for the protection of the public health or for purposes of preventing fraud, and the amended complaint clearly alleges facts to show that the standard containers provided by the orders under attack do not preserve the public health or prevent fraud.

(d) Factual Analysis of Orders.

We will now examine the orders in question in the light of the above authorities. To sustain the above orders, it must be shown that they are necessary to prevent fraud or deception of the public, or to protect the public health, or to promote the public welfare, because obviously the

public morals are not involved. It must be further shown that the orders are reasonably necessary to effect the object sought to be accomplished. Furthermore, as was said in *Willoughby on the Constitution* (2nd Ed.) at page 1778:

> "The police power may not be employed to prevent evils of a remote or highly problematical character nor may its exercise be justified when the restraint imposed upon the exercise of private rights is disproportionate to the amount of evil that will be corrected."

Section 18-2902, Oregon Code, 1930, provides that standards for containers of horticultural products may be promulgated to promote, protect, further and develop the horticultural interests of the state. But it follows naturally that the standards must be reasonable. The amended bill of complaint in Paragraph VIII (R. 6) alleges that there is *no necessity for the particular orders relating to strawberries and raspberries as set forth in Exhibit A and Exhibit B based on consideration of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon.* This allegation of the amended complaint is not controverted and must be considered as admitted. No denial was made by the appellees and no affidavit was introduced by appellees on the hearing for the interlocutory injunction setting

forth in what way the particular orders promote, protect, further or develop the horticultural interests of the State of Oregon.

As a matter of fact, the horticultural interests of the State got along very nicely before the passage of this statute and there is no showing that the orders promulgated under it have promoted, protected, further or developed such interests.

Even though we were to concede, for the purpose of this argument, that the adoption of certain standards would promote the public welfare and therefore be justified, nevertheless the standards that were adopted would be subject to the scrutiny of this court if an attack were made on the ground that they deprived appellant of its property without due process of law.

Now let us examine the specifications of the orders in question as they relate to the strawberrey and raspberry cups. The orders provide for a pint hallock. We do not question the reasonableness of the standards so far as the *capacity* of the container is concerned. A number of statutes provide for containers of a definite capacity, and it is quite clear that the adoption of a well recognized capacity such as a pint would have the tendency to prevent fraud. But we challenge the orders on the ground that the *hallock cup or basket type* is specified and the tin-top or metal rim cup, such as is manufactured by the appellant and others, and which was in general use at the time of the adoption of the orders, is outlawed, as well as all other types except the hallock.

1. *The type of cup specified in the orders does not prevent fraud or deception of the public.*

(a) First, so far as cubic contents are concerned: The amended complaint alleges that the cup made by plaintiff contains a dry pint and has a reinforced metal top, insuring uniformity of cubic measure. Such baskets also have a solid and not a false bottom. Under the circumstances, it cannot even be urged that the so-called hallock described in the orders better protects the public from fraud or deception as far as cubic contents are concerned than do the tin-top baskets such as are manufactured by plaintiff. *As a matter of fact, the hallock is itself a deceptive container.* It has a raised or false bottom. This may become wedged in such a way that the inside depth is considerably less than the standard, or in selling berries to customers the salesman may push up this loose bottom, thus indicating a very full box where as a matter of fact the box is not full. Another opportunity for fraud is to turn the boxes upside down and place a number of them in the middle of the crate. The shallow tops will hold two rows of berries and the deception cannot be discovered until the crate is unpacked. Furthermore, the customer thinks he is receiving a quantity of berries based on the exterior of the box and may overlook the fact that it has a raised-up bottom. Incidentally, the baskets or cups specified in the orders give only the approximate cubic content because all dimensions except the depth are *outside* dimensions. See particularly the discussion on this matter of approximate content in *Mattei v. Hecke*, supra, in which the California court commented that the standards set forth in

the California Act for grapes were only approximate in that outside measurements were used.

(b) Does the type adopted as standard allow the customer to see the quality of the fruit as easily as the tin-top and other types, and thus prevent deception? The answer is obviously "no". The hallock has no opening at the corners as has the tin-top berry cup. Through the openings at the corners in the tin-top cup, the prospective purchaser can see the quality and size of the fruit without upsetting the container and not merely what is on top.

2. *As to the preservation of public health*: Another legitimate justification for adopting a standard container would be that the berries will be better preserved in the standard container than in other types which have been rejected by the orders. On this point, reference is made to Paragraphs VI and VIII of the amended bill of complaint (R. 4, 5, 6) in which it is alleged that the baskets manufactured by plaintiff have an opening at each of the corners so that the berries therein contained are amply ventilated, thus tending to prevent the berries from decaying. The fact that the bottoms of the tin-top boxes are smaller than the tops allow ventilation between the boxes in the crate. It is further alleged in such paragraph that the manner of packing strawberries and raspberries in metal-top baskets or cups as described is conducive to the preservation of the berries contained therein, to honest measurement, and to fair dealing with purchasers. The hallock described in the orders involved has no such slits on the corners or at any place on the sides and the berries

are not ventilated. There is no ventilation between boxes in the crates as the hallocks fit snugly up against each other. It consequently follows that the orders cannot be justified on the ground that they preserve the public health.

3. *As to the promotion of the public welfare:* There is nothing to show how the adoption of the particular standards promote the public welfare. The fact that irregular sizes are eliminated and thus simplify the problems of transportation is a matter of purely private concern, and one which the growers and shippers should be free to solve in any manner they see fit.

As was said in the case of *Weaver v. Palmer Bros.*, 270 U. S. 402, 415, 70 L. Ed. 654, 658, the constitutional guaranties may not be made to yield to mere convenience.

4. *Orders provide for a monopoly.*

The orders under attack grant a monopoly to manufacturers of hallocks and deprive appellant and others of the market for berry boxes of the types which they previously manufactured and sold. The hallock can only be made of spruce which is grown only in the Pacific Northwest, thus limiting the monopoly to manufacturers in that area and excluding all others from the field. (See Amended Bill of Complaint, Paragraph VIII and Paragraph XI (R. 6 and 7).

The following statement is made by Herman Paine in his affidavit of June 15, 1934 (R. 26):

> "That hallock baskets of the type required by the regulations complained of in the above entitled suit as standard containers for strawberries and rasp-

berries, are made of rotary cut veneer, taken directly from spruce logs; that such spruce logs are not available at or near the plant of the plaintiff corporation and cannot be transported thereto except at prohibitive cost;"

Instead of promoting, protecting, furthering and developing the *horticultural* interests of the State, the orders in question promote, protect, further and develop the *manufacturers of hallocks.* That is not what the statute provided for, although that is the obvious effect of the orders.

The orders are unreasonably discriminatory in favor of the hallock type of basket and against all others, including the tin-top basket made by plaintiff. As we have pointed out, there is no reasonable basis for such discrimination. Why limit the type of containers in which berries can be sold in the State of Oregon to the hallock type of basket? There is certainly no evidence or finding to answer this question.

A case very closely in point is *State v. Santee,* 111 Iowa 1, 82 N. W. 445, 82 A. S. R. 489, 53 L. R. A. 763. The material part of the statute under which the defendant was prosecuted reads as follows:

"If any person 'sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than 105 degrees, standard Fahrenheit thermometer, closed test, * * * except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum * * * when used in the Wels-

bach hydrocarbon incandescent lamp * * * he shall be punished,' etc., Code, paragraph 2508."

The Court said:

"Exclusive privileges and franchises may, no doubt, be granted when absolutely necessary to insure safety to the people, but not otherwise. See Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394. In this case the parties agreed, however, that there are other lamps, operated on the same general principles as the Welsbach, that are equally safe, and that secure the same results. This being true, the legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the state but the legislature cannot under this guise create a monopoly. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State ex rel Atty. Gen. v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Hudson v. Thorne, 7 Paige 261; Norwick Gaslight Co. v. Norwick City Gas Co., 25 Conn. 17. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not depend primarily on governmental permission. Defendant would have the right to use any lamp and kind of gas or vapor he chose for the purposes of lighting his building, in the absence of some police regulation imposed by the legislature; and a law that required him to use a particular lamp, when others equally safe were in the market, would be a violation of his constitutional rights, and would also give to the manufacturer special privileges over others producing equally meritorious lamps."

Another case in point is *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 A. S. R. 183. In that case the statute provided that the containers

for certain fruit should set forth a statement truly and correctly designating the County and immediate locality in which the fruit was grown. The Court said:

> "It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit-raisers of some well-advertised and favored localities, an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in People v. Hawkins, 157 N. W. 1, 68 Am. St. Rep. 736, 51 N. E. 257, forms no part of the police power, and is wholly beyond the prerogative of the legislature."

There is nothing in the record to justify the selection of the hallock and the outlawing of all other types. Certainly judicial notice will not supply the necessary facts to support the action of the appellees.

(e). Orders Are Arbitrary, Capricious and Unreasonable.

The above discussion clearly bears out the allegation in Paragraph VIII of the amended complaint that there is no necessity for the particular orders based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and there is no showing how the hallock promotes, protects, develops or furthers the horticultural interests of the State of Ore-

gon. An order which makes illegal, types of containers which are in general use, and which give as good or better protection to the fruit from the standpoint of health, and which do not tend to deceive or defraud the public, in favor of a certain type of container which is not as well designed as those outlawed, is certainly palpably arbitrary and capricious, particularly as there is no finding of facts on which to base the selection, and where no appeal is provided for by any party who may be injured.

We do not believe this Court will sustain an order made by an administrative official designating a certain type of container which he may choose merely because it strikes his fancy. If a director of agriculture or the chief of the bureau of plant industry can designate a particular type, of particular detailed dimensions, it would be equally reasonable for such officials to require that the baskets be painted pink, or that they be manufactured from spruce over a hundred years old, or that the baskets be octagonal or round in shape, or that the baskets be only so deep that they would contain one layer of berries, or other equally capricious specifications. Under what possible basis of reasoning can it be argued that a container 4⅜x4⅜ inches outside measurements can possibly better protect public health or prevent deception or promote the public welfare than a container which may happen to have an ⅛ inch greater length or an ⅛ inch less breadth?

On the record before this Court what possible justification is there for the requirement in the orders under attack that the bottoms of the containers must be raised ¾ of an inch? What showing is there that such a false bottom

protects the public health or prevents fraud, or even furthers horticultural development of the State? If there are any reasons for such a false or raised-up bottom, such reasons must be made manifest, particularly after denial of any such justification in appellant's amended complaint. The reason cannot be supplied from outside the record, nor do we think they are within the judicial knowledge.

Congress has passed certain legislation establishing certain standards for fruit and vegetable containers. Provision with reference to standard baskets or containers for small fruits and vegetables is found in *Section 252 of Title 15, United States Code Annotated* and reads as follows:

> *"Section 252. Standard Basket or Container for Small Fruits and Vegetables.* The standard basket or other container for small fruits, berries and vegetables shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. (a) The dry half pint shall contain 16 and 6/10ths cubic inches; (b) The dry pint shall contain 33 6/10ths cubic inches; (c) The dry quart shall contain 67 2/10ths cubic inches."

It should be noted that nothing is said as to the shape of the container, the type of the container, the particular materials of which it should be manufactured, or its specific dimensions. All that is provided is capacity. There are no other specifications. Obviously, after study, it was found that no other specifications were required.

(f) Official Containers for Berries Are Invalid Because They Differ From Standards Approved By Congress.

Section 18-2904, Oregon Code, 1930, provides as follows:

> "The board is authorized to fix and promulgate as the official standards for this state for any horticultural product or container the standard for such product or container which may have been promulgated or announced therefor under the authority of the Congress of the United States, and in carrying out the provisions of this act the board is authorized to cooperate with the United States or any department thereof in accomplishing the matters and things provided for herein."

Even though there were no other objections to the orders of appellees fixing the specifications for standard containers for berries, the orders would be void because appellees have gone beyond the authority conferred by the above section. We have pointed out that the Congress of the United States has promulgated as the official containers for berries a basket or container with only a designated capacity. The standard containers for berries fixed by the orders made by the appellees is not the standard for the container promulgated by the authority of the Congress of the United States, but differs from it in specifying the exact dimensions and a particular type of container.

Therefore, even though Section 18-2902 were not invalid on other grounds, and assuming that the legislature

could delegate to the appellees the authority to fix and promulgate standard containers, yet the appellees have gone beyond that authority and the orders should be declared void on that ground.

California is interested in its horticulture to such an extent that the Legislature adopted a voluminous agricultural code, but the only specification for strawberry and raspberry cups or baskets was that they contain a dry pint, or in the case of other berries, a half pint.

> "Strawberries * * * All strawberries shall be in the dry pint baskets containing an interior capacity of approximately 33.6 cubic inches. All other berries shall be in the dry pint baskets or in the dry half pint baskets containing an interior of approximately 16.8 cubic inches." *Sec. 793, California Agriculture Code.*

In the case of *Stegmann v. Weeks*, 279 Mo. 140, 214 S. W. 137, the Supreme Court of Missouri had under consideration an ordinance of the City of St. Louis which provided for the use of a bushel box and specified the cubic content of such box. The statute further went on and specified the exact dimensions of the particular box, but only provided a penalty for the sale of fruit in boxes or receptacles of a *capacity* different from that provided in the ordinance. The plaintiff sought to enjoin the enforcement of the statute, setting forth that he and a large number of other farmers were using boxes of a different capacity and of different dimensions than the boxes designated as standard. The Court sustained the statute insofar as the question of capacity was concerned, but went on to state that the provisions of the statute having to do

with specified dimensions, did not provide for a penalty and since plaintiff could not be injured under that part of the ordinance, denied the injunction. The Court said:

> "However, it is sufficient answer to this point to say that no penalty is fixed for the violation of that part of the ordinance describing the dimensions of the box; the plaintiffs could not be prosecuted for the misdemeanors unless they used boxes of different capacity."

The concurring opinion of Judge Faris is a clear and concise argument for the appellant in the case at bar, and for that reason we are setting out the concurring opinion in full:

> "I concur for the reason only that there is no penalty attached for the failure to use a container of the prescribed dimensions, thus leaving so much of the ordinance as prescribes the dimensions of such containers neither mandatory nor punishable, but advisory only.
>
> "I do not agree that the city of St. Louis has the authority, under the guise of a police regulation, to require the use of containers of fixed and arbitrary dimensions. I concede the authority in the city to pass an ordinance requiring such containers to be of a certain capacity so as to guard against fraud and cheating, and even to require such containers to be rectangular in shape, so as to minimize time and labor in ascertaining the conformity of such containers to the capacity required by the ordinance. But I do not think it lies in the power of the city I say by its ordinance that such containers be of required length, width, and depth. Neither do I think that one using containers of an impeccable capacity, so far as com-

plying with the requirement as to capacity is concerned, could be punished in any way for using longer or a shorter, a wider or a narrower, a deeper or shallower container than the arbitrary standard prescribed by ordinance.

"Upon the view that the ordinance means what I have said above that it ought to mean, I concur."

In the Court below, counsel for defendants argued that the orders were adopted after full hearing and consideration of the subject by parties interested. *There is nothing in the record and it is expressly denied by affidavit that appellant was ever represented or present at any of the hearings.* But even though there was a full hearing and even though all those present at the hearing, exclusive of appellant approved the order, nevertheless if the order was unreasonable, arbitrary or capricious, it would be subject to attack by plaintiff. *The reason for the Constitutional provision that a party shall not be deprived of his property without due process of law is to afford protection where a majority in a state has passed legislation, or an administrative body or officer has made orders, which violate the Constitutional right of anyone.*

(g) There is Only a Rebuttable Presumption of Constitutionality for Acts of Legislature.

In their brief in the lower court, counsel for appellees cited a number of cases to establish the point that where the Legislature has passed legislation, there is a presump-

tion of validity which can only be overcome if the facts show the statute to be clearly arbitrary or unreasonable. In the first place, every case cited by counsel for appellees dealt with an act of a Legislature. In the case at bar, there is challenged the acts of administrative officials. We have pointed out previously in this brief that there is an obvious difference between an act of a legislature and an act of an administrative official which is not based on adequate findings of facts.

Even though there be a presumption of constitutionality, such presumption may be rebutted.

In the case of *Borden's Farm Products Co. v. Baldwin*, 79 L. ed. Ad. Op. 130 at 135, this court discusses the matter as follows:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. (Citations left out.) It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack."

It is submitted that we have shown facts which are uncontroverted that completely rebut the presumption of validity and have shown that the orders in question are palpably arbitrary, unreasonable and the capricious acts of appellees as administrative officials, not based upon

evidence or findings of facts; that there is no provision for appeal, and that the orders go much farther than the necessity of the case demands, particularly where there is no showing that the orders in question effectuate the purpose of the act on which they are presumably based.

We will now discuss briefly some of the cases cited by appellees in the court below and relied on by the lower court in its opinion. In the case of *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, this court had under consideration a municipal ordinance adopting a standard weight loaf of bread. The ordinance did not go further than to set the standard of weight. There was substantial testimony introduced at the hearing in that case and it was clearly shown that the ordinance was passed to protect the public from fraud in a common article in everyday use. If the Chicago ordinance had undertaken to prescribe the exact dimensions of loaves of bread, and had fixed that size in such a way as to give certain bakers a virtual monopoly, shutting out competition by others unless they installed expensive machinery, no member of the court would have sustained the ordinance. The case is clearly distinguishable from the case at bar upon the facts. There have been a number of other cases in which standards affecting weight or capacity alone have been sustained and we have no quarrel with these cases nor the principles of law laid down therein. They are readily distinguishable from the case at bar which is unique in that the orders not only specify one peculiar type of container, but they specify the exact outside measurements, rather than the capacity. Incidentally, all of these cases were appeals

from legislative enactments with the exception of the case dealing with the municipal ordinance involved in the Schmidinger case.

The recent case of *Nebbia v. People of the State of New York,* 291 U. S. 502, 78 L. ed. 940, will probably be cited by counsel for appellees. In the prevailing and dissenting opinions in that case, there is an extensive review of the decisions of this Court dealing with the police power and the Fourteenth Amendment. As we understand the case, no new rule of law is set forth. The case sustained the power of the State of New York in the matter of fixing prices in the milk business. As was said by the Court in the prevailing opinion:

> "The function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (Page 536.)

In the Nebbia case, the record is very full, showing facts surrounding the industry which the New York legislature deemed sufficient to justify the legislation. Considerable emphasis is placed upon the emergency conditions in the industry. The majority of the Court were of the opinion that under the particular facts introduced, the legislation should be sustained.

In the case at bar, all such evidence is lacking. There is no showing that either in the horticultural industry or the berry industry that it was necessary that standard con-

tainers be established, or that the effect of the establishment of the particular or any standard containers did protect, further or promote horticultural interests of the State of Oregon.

It is submitted that the orders so far as they relate to strawberry and raspberry containers should be held void as depriving appellant of its property without due process of law, and not within the legitimate use of the police power.

II. THE ORDERS IN QUESTION ARE VOID BECAUSE THEY INTERFERE WITH AND IMPOSE UNLAWFUL BURDENS ON THE INTERSTATE COMMERCE OF APPELLANT.

The amended bill of complaint points out that plaintiff is engaged in the business of manufacturing the berry boxes in question in the State of California and sells them to dealers in the State of Oregon and also sells them to dealers in the State of California who have in the past filled such boxes and shipped the boxes of berries from California to the State of Oregon. See Paragraph VII of the amended complaint (R. 5). As the bill of complaint further alleges, the effect of the orders in question, coupled with the legislation making it unlawful to sell or ship berries in the State of Oregon, irrespective of the origin of the berries, in other than the standard containers, is to prevent the use of the containers manufactured by

plaintiff, in the State of Oregon and the shipment of California berries packed in such containers into the State of Oregon.

In the opinion of the Court below and in the brief of counsel in the Court below, the statement was made that the statutes involved in this case are limited so as not to apply to berries brought from outside the state and offered for sale, consigned for sale or sold in the original package in the state. While it is true that *Section 18-2911, Oregon Code, 1930,* makes this limitation, *Section 3 of Chapter 225, Oregon Laws of 1933,* makes no such exception. That section reads as follows:

> "It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the state of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the State of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-products plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and/or other horticultural products."

The orders involved in this case are void because they place a direct burden upon interstate commerce. The effect of the orders may be stated as follows: "Producers

and dealers of berries grown in the State of California, if you desire to sell these berries in Oregon you must purchase hallocks which cannot be made in California, but which can only be made in Oregon. Otherwise, you cannot sell your berries in Oregon." It cannot be said in support of the orders that berries packed in other than hallocks are bad for the health or have a tendency to defraud the public. The recent case of *Baldwin vs. Seelig*, 79 L. ed. Ad. Op. 525 at 529 is directly in point.

The Court below in its opinion, in discussing the matter of interstate commerce, relied on the fact that when the original package was broken up for use, it ceased to be a part of foreign commerce and became subject to the laws of the State, and its was argued that the interstate commerce clause would not apply. In other words the Court below used what is known as the test of the original package.

This Court in the recent case of *Baldwin vs. Seelig*, supra, stated:

> "In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. vs. Public Service Commission, 225 N. Y. 397, 403, 122 N. E. 260, P. U. R. 1919C, 663. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this over-mastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim

and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the nobility of commerce. They set up what is equivalent to a rampart of customs duty designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in results. The form of the packages, in such circumstances, is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading unescapedly to the suppression so intended.

"The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices, and other consequences of Vermont competition. To overcome that competition, a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate commerce transactions were not meant to be a cover for retortion or suppression." (Pages 530-531.)

The decision above quoted is particularly apt in the case at bar. Here in this case the amended complaint and affidavits show (R. 6) that the type of box adopted by the Director of Agriculture can only be made in the

Northwest. The officials of the State of Oregon, to prevent competition with berry boxes made outside the State of Oregon have adopted regulations, the effect of which is to prohibit the shipment into Oregon of berry boxes made in California. Here we have a direct burden on interstate commerce, the effect of which is to eliminate competition from sources outside of the Northwest, in the berry box field. There is nothing in the record to show that the hallock has any advantages over the tin-top berry box so far as prevention of fraud, protection of public health or the public morals, or the public convenience, is concerned.

But there is another reason why the orders and *Section 3 of Chapter 225 of Oregon Laws of 1933* cannot be upheld. Congress has defined a standard container for baskets for small fruits and vegetables in *Section 252 of Title 15, United States Code Annotated*, which provided as follows:

> "The standard basket or other container for small fruits, berries and vegetables shall be of the following capacity, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. (The dry half pint shall contain 16.6 cubic inches; the dry pint shall contain 33.6 cubic inches; (c) the dry quart shall contain 67.2 cubic inches.)"

That section merely limits the capacity of containers for berries. But the orders which have been challenged in this case not only specify the cubic contents, but limit the type of basket that is allowed and provide that it must have a raised-up bottom and specify the exact length,

breadth and width. Such orders are clearly inconsistent and go far beyond the legislation provided by Congress.

> "* * * the state could not regulate the business by a statute which had the effect to control and burden interstate commerce."
>
> Lemke v. Farmers' Grain Co., 258 U. S. 50, 55; 66 L. ed. 458, 462; 42 Sup. Ct. Rep. 244.
>
> "When Congress exerts its authority in a matter within its control, State laws must give way, in view of the regulation of the subject matter by the superior power conferred by the Constitution."
>
> U. S. v. Hill, 248 U. S. 420 at 427; 63 L. ed. 337 at 341, 39 Sup. Ct. Rep. 143.

A case cited with evident confidence by the appellees in the court below holds as follows:

> "The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce."
>
> Savage v. Jones, 225 U. S. 501, 524, 525; 56 L. ed. 1152, 1191.

It is submitted therefore that the orders under attack and Section 3 of Chapter 225 of General Laws of 1933, should be declared void as interfering with and imposing unlawful burdens on interstate commerce, and particularly the business of plaintiff, contrary to and in violation of the provisions of sub-division 3 of Section 8 of Article I of the Constitution of the United States.

III. THE STATUTE, UNDER THE AUTHORITY OF WHICH THE CHALLENGED ORDERS WERE MADE, CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY TO ADMINISTRATIVE OFFICIALS.

Article III of the Constitution of Oregon provides as follows: "The powers of the government shall be divided into three separate departments—the legislative, the executive including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

Article IV, Section 1 of the Constitution of the State of Oregon provides: "The legislative authority of the State shall be vested in a legislative assembly * * *"

The section of the law relied upon by the appellees to support the orders is *Section 18-2902, Oregon Code, 1930*, which provides as follows:

> "In order to promote, protect, further and develop the horticultural interests of this state, the Board *is hereby authorized and empowered*, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time." (Italics ours.)

The above Act delegated to the Oregon State Board of Horticulture the authority to fix and promulgate official

standards for containers. However, under the provisions of *Chapter 136 Oregon Laws 1931* (see appendix), all of the functions of the Oregon State Board of Horticulture were taken over by the State Department of Agriculture under the direction of a single official known as the Director of Agriculture, and one of the appellees in this case, the other appellee being merely a chief of one of the divisions of the Department of Agriculture.

Section 18-2902 Oregon Code 1930 does not *direct* the Board of Horticulture to fix and promulgate standards for grading and classifying horticultural products and to fix official standards for containers. It merely authorizes the Board to take such action in the discretion of the Board. The matter of whether any action shall be taken rests wholly in the uncontrolled discretion of some one other than the legislature, originally the Board of Horticulture, now the Director of Agriculture. The legislature did not make a law requiring the Board to fix standards after investigation and public hearing. It merely delegated the right to make such a law to the Board. A discretion was given the Board not only as to whether or not there should be any law fixing and promulgating official standards, but complete authority was given as to what the law should be. This statute did not merely give authority or discretion as to the execution of a law which the legislature had made to be exercised under and pursuant to such a law, but actually delegated to the Board the matter of whether or not there should be any official containers at all.

On the principle that a legislature cannot delegate the

authority or power to make a law, as distinguished from the power to administer it, the statute in question should be declared invalid.

In the case of *Van Winkle v. Fred Meyer, Inc., decided on October 2, 1935, by the Oregon Supreme Court,* and heretofore referred to in this brief, the Court dealt with the problem of delegation of authority by the legislature, under the Oregon Constitution and said:

> "Under our constitution, Article IV, section 1, the power to make and declare laws, subject only to the initiative and referendum powers reserved to the people, is vested exclusively in the legislative assembly and, by Article III, section 1, the powers of government are divided into three departments, namely: the legislative, the executive, including the administrative, and the judicial, and each of said departments is prohibited from exercising any of the powers conferred upon either of the others. Under these provisions the legislature cannot confer upon any person, officer, agency or tribunal the power to determine what the law shall be. * * *
>
> "Under the very terms of the act in question, there is to be no law fixing the price of any commodity or regulating its production or sale unless a preponderant majority engaged in its production or sale formulate an agreement and secure its approval by the governor. Under the specific directions of the act, when this has been done, the prices so fixed and the regulations so adopted are to become the law of the state, but if no agreement is entered into, then there is to be no law. This leaves wholly to persons outside the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be. It is impossible to conceive of a more complete delegation of legislative

power and, since the act contravenes the plain provisions of our constitution in that it attempts to make an unlawful and unauthorized delegation of legislative power, the act is unconstitutional and void. The same conclusion was reached by the supreme court of Wisconsin in the case of Gibson Auto Co. v. Finnegan (250 N. W. 420), in respect to an act very similar in its terms to the one involved here. (Quotations from Finnegan case omitted.)

"The legislature of the State of Washington enacted a similar law to the one involved here, known as the Washington Agricultural Adjustment Act. The purposes of its enactment were the same as those in question here, and it contained many identical provisions with those found in the act involved here. In passing upon its validity, because of the same objections now urged here, the supreme court of that state held the act to be unconstitutional in Uhden v. Greenough, 81 Wash. Dec. 361, 43 P. (2d) 983, and Griffiths v. Robinson, 81 Wash. Dec. 384, 43 P. (2d) 977. The act was thereafter amended, seeking to avoid the constitutional objections that had been urged and sustained against its validity in the two cases cited. As so amended, the act was again held to be unconstitutional as an unauthorized and unlawful delegation of legislative power in State v. Matson Company, 82 Wash. Dec. 430.

"The constitutional principle which denies to the legislature the authority to delegate the power of making laws and authorized it to delegate purely administrative functions was stated by the supreme court of Ohio in Cincinnati, Wilmington, etc. R. Co. v. Clinton County Commissioners, 1 Ohio St. 77, 88, in these words:

'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be,

> and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'
>
> "That language was quoted with approval by the supreme court of the United States in Field v. Clark, 143 U. S. 649, and again in the recent case of Panama Refining Co. v. Ryan, 293 U. S. 388."

Substantially similar provisions of the Federal Constitution were construed by this Court in passing upon the constitutionality of the National Industrial Recovery Act.

The cases are so recent that we deem it unnecessary to quote extensively from them.

> Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. Ad. Op. 223; 55 Sup. Ct. 241.
>
> Schechter v. United States, 79 L. Ed. Ad. Op. 888; 55 Sup. Ct. 837.

The United States Circuit Court of Appeals for the First Circuit held the Federal Agricultural Adjustment Act unconstitutional on the ground that it provided for an improper delegation of legislative authority, in the case of *Butler v. United States*, 78 Fed. Rep. (2d) 1.

> "What the Supreme Court said of section 9 (c) of the National Recovery Act (15 USCA 709 (c) in the Panama Refining Co. case may likewise be said of section 2 of the Agricultural Adjustment Act, 7 USCA 702, and section 8, as amended, 7 USCA 608). Neither section 2 nor section 8 of this act states whether or under what circumstances the Secretary

shall enter into agreements to limit production of basic agricultural commodities. Action by the Secretary is not mandatory, and the Act establishes no criterion to govern his course of action. It requires no finding by him as a condition of his action, nor is any provision for judicial review provided in the Act in case of a finding that such standard in fact exists. It is true that the facts in this case are different from those in the Panama Refining Co. case and in the Schechter poultry case, but the provisions defining the acts of the Secretary differ from those authorizing the acts of the President in those cases only in the general terms employed. The principle involved is the same."

Butler v. United States, 78 Fed. (2nd) 1.

Not only does *Section 18-2902 Oregon Code 1930* leave it optional with the Board (now the Director of Agriculture) to promulgate standards for containers, but this section fails to provide any standards to govern the discretion of the administrative officials, in setting such standards. An examination of the statute in question shows that it merely contains the following language:

"* * * In order to promote, protect, further and develop the horticultural interests of this State. * * *"

This language certainly cannot be considered as providing any legal standards. This court dealt with this subject in construing the National Industrial Recovery Act.

Panama Refining Co. v. Ryan, supra.

Schechter v. United States, supra.

See also Butler v. United States, supra.

In passing on the Oregon Agricultural Adjustment Act, the Oregon Supreme Court in the case of *Van Win-*

kle v. Meyer, supra, construed language very similar to that set forth in the statute involved in this case, as follows:

> "The further objection that this act is unconstitutional because it contains no standard or guide and prescribed no rule of law by which the powers conferred under the act are to be exercised must also be sustained. It is a fundamental principle of constitutional law that in delegating powers to an administrative body, the legislature must prescribe some rule of law or fix some standard or guide by which the actions of that body, in administering the law, are to be governed and made to conform. Under this act, there is no rule of law, nor is there any standard or guide prescribed by which the persons to whom the powers are to be delegated are to be controlled or to which they must conform."

To the same effect are the recent decisions of the Washington Supreme Court construing the Washington Agricultural Adjustment Act.

> Uhden v. Greenough, 81 Wash. Dec. 361, 43 P. (2d) 983.
>
> Griffiths v. Robinson, 81 Wash. Dec. 384, 43 P. (2d) 977.
>
> State v. Matson Company, 82 Wash. Dec. 430.

There is a further ground why *Section 18-2902 Oregon Code 1930* should be held to be an unconstitutional delegation of authority to appellees. The statute, although providing for investigation and public hearing, makes no provision for findings of fact, the giving of any particular notice, nor does it provide that the board, even after hearing, shall be bound by the evidence brought out at such hearing. Furthermore, no provision is made for appeal

from the order of the administrative official fixing and promulgating official standards for containers.

> "And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual."
>
> Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. Ad. Op. 223 at 238, 65 Sup. Ct. 241.

To the same effect, see *Butler v. United States*, 78 *Fed. (2d) 1*, particularly at page 10.

It cannot be argued that the Director of Agriculture will act only in the public good in promulgating the standards. As was said in the case of *Panama Refining Co. v. Ryan, supra*:

> "The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute."

It is submitted that Section 18-2902 Oregon Code of 1930, and the challenged orders based on this section should be declared void on the ground of unconstitutional delegation of legislative authority.

The question of improper delegation of legislative authority arises under the Constitution of the State of Oregon. While this point alone does not involve a Federal question, since the United States District Court and this court have acquired jurisdiction by reason of Federal questions involved, this court has the right to decide all questions in the case.

"If the bill presented a substantial controversy under the Constitution of the United States, and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the Federal question."

Lincoln Gas & Electric Co. v. Lincoln, 250 U. S. 256, 264, 63 L. ed. 968, 39 S. Ct. Rep. 454.

Siler v. Louisville Nashville Railway Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. Rep. 451.

Hurn v. Oursler, 289 U. S. 238, 243, 244, 77 L. ed. 1148, 1152, 1153, 53 S. Ct. Rep. 586.

Glenn v. Field Packing Co., 290 U. S. 177, 78 L. ed. 252, 54 S. Ct. Rep. 138.

CONCLUSION

This suit was originally instituted and this appeal taken because appellant, a manufacturer of fruit and vegetable baskets, other containers, and berry cups, believed that the Department of Agriculture of the State of Oregon had fixed and promulgated palpably unreasonable, arbitrary and capricious standards, particularly for berry baskets or cups. Appellant was not and is not willing to concede that standards and specifications may be fixed for containers at the whim of an administrative official, or even by a legislature, merely so that all such containers shall be exactly alike. Enforced standardization is not designed to further and develop horticulture as much as it is designed to create a monopoly for the benefit of the manufacturers of the favored type of container.

Appellant believes that the orders in question insofar as they relate to strawberry and raspberry containers and the supporting statutes should be declared unconstitutional and void.

I. They deprive appellant of its property without due process of law and are not a legitimate use of the police power.

(a) The orders in question were promulgated not by the legislature but by administrative officials and the orders do not contain any findings of fact based on adequate evidence justifying the particular specifications, or the necessity for any specifications.

(b) A careful study of the cases dealing with the legitimate bounds of the police power shows that while it is not susceptible of definition with precision, it must be exercised within a limited ambit and the final determination rests upon a study of the particular facts in each case. If, after such study of the facts, this court comes to the conclusion that the law or orders complained of are unreasonable, arbitrary and capricious in reference to the particular subject matter, or if the means employed have no real, substantial relation to a public object which government can accomplish, or if the orders are beyond the necessities of the case, then this court will decree the challenged law or orders as being in conflict with constitutional inhibition. This case arose on a motion to dismiss the amended bill of complaint for insufficiency of facts, and on a denial of appellant's petition for an interlocutory injunction. The only facts therefore before the court are the uncontroverted allegations of the amended bill of complaint,

and the affidavits in support of the interlocutory injunction. We have discussed the facts as alleged quite fully and we believe that these facts show that the specifications involved are clearly unreasonable, arbitrary and capricious and that the orders are not necessary for the furtherance of the horticulture of the state. The facts alleged in the amended bill of complaint fully rebut any presumption of validity, even if the orders were acts of the legislature and not merely the fiat of administrative officials, unsupported by findings of fact. There is not even a provision for appeal by a party who may be aggrieved by the administrative orders. The only effect of the enforced standardization is to grant a monopoly to manufacturers of the favored type of container. The orders are in conflict with the standards provided by Congress and therefore contrary to *Section 18-2904,* which only authorizes standards in accord with those fixed by the Congress of the United States. It is therefore submitted that the orders insofar as they relate to strawberry and raspberry containers be declared void as depriving appellant of its property without due process of law.

II. The orders and statutes involved clearly burden interstate commerce as berries shipped from outside the State of Oregon cannot be sold or transported within the State of Oregon unless in the standard containers. Tin-top baskets made by appellant in the State of California cannot be shipped and sold in the State of Oregon. Congress has defined a standard container for small fruits and vegetables by merely specifying the capacity, and the detailed specifications of the orders complained of are in conflict

with the supreme Federal law. Therefore, the orders under attack, and *Section 3 of Chapter 225 General Laws of Oregon*, should be declared void as interfering with and imposing unlawful burdens on interstate commerce.

III. The statutes, under the authority of which the challenged orders were made, constitute an unlawful delegation of authority to administrative officials.

(a) It is left to the discretion of the administrative officials as to whether there shall be any law or order providing for standard containers and as to what such law shall be. (b) The statute provides no standard or policy to guide the administrative officials. (c) There is no provision for findings of fact to be made part of the administrative order. Too much is left to the uncontrolled discretion of the administrative official.

We believe that there has been presented a sufficiently strong case for a final determination by this court, declaring the challenged orders and supporting statutes unconstitutional. We therefore urge that the decree of the lower court be reversed with directions to enter a permanent injunction as prayed for by appellant.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Solicitors for Appellant.

APPENDIX "A"

Section 18-2902, Oregon Code of 1930:

"In order to promote, protect, further and develop the horticultural interests of this state, the board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time."

(The Board referred to in said Section was the Oregon State Board of Horticulture.)

Section 18-2904, Oregon Code of 1930:

"The board is authorized to fix and promulgate as the official standard for this state for any horticultural product or container the standard for such product or container which may have been promulgated or announced therefor under the authority of the congress of the United States, and in carrying out the provisions of this act the board is authorized to cooperate with the United States or any department thereof in accomplishing the matters and things provided for herein."

Section 18-2911, Oregon Code of 1930:

"• • • Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable,

unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. * * * Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both."

Chapter 136 Oregon Laws 1931:

"Section 1. There hereby is created a department of the government of the state of Oregon to be known as the state department of agriculture, hereinafter called the department. The department shall be conducted under the control of an executive officer to be known as the director of agriculture, hereinafter called the director, who shall be appointed by the governor, and shall serve during his pleasure.

"Section 2. For purposes of administration the director shall organize the work of the department under five divisions: (1) Administration, (2) plant industry, (3) animal industry, (4) foods and dairies, (5) markets, grades and standards.

"Section 3. Over each division there shall be an officer to be designated the chief of his division. The director shall be ex officio chief of the division of administration. The chiefs of the other divisions shall be appointed by the director with the consent of the governor and shall hold office at the pleasure of the director.

* * * *

"Section 5. On and after July 1, 1931, the department

of agriculture shall succeed to and hereby is invested with all the powers and duties of the state board of horticulture, * * *."

Chapter 225, Oregon Laws 1933:

"* * * Section 3. It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the state of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-product plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and or other horticultural products.

"Section 8. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than the sum of $20 nor more than $500 or by imprisonment in the county jail for a period not to exceed 60 days, or by both such fine and imprisonment."